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James T. Wadsworth v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0049

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APPELLANT'S BRIEF

FEB 5 1976

SUPREME COURT OF KENTUCKY

FILE NO. 76-49

JAMES T. WADSWORTH

APPELLANT

VS.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOHN P. HAYES, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. John P. Hayes, Judge, Jefferson Circuit Court, Jefferson County Courthouse, Louisville, Kentucky 40202; Hon. David L. Armstrong, Commonwealth Attorney, 30th Judicial District, Louisville, Kentucky 40202; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 5th day of February, 1976.

William M. Radigan

FILED

FEB 5 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

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SUPREME COURT OF KENTUCKY

FILE NO. 76-49

JAMES T. WADSWORTH

APPELLANT

VS.

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HON. JOHN P. HAYES, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

* * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

DID THE COURT BELOW ERR TO APPELLANT'S
SUBSTANTIAL PREJUDICE BY OVERRULING
APPELLANT'S MOTION TO VACATE JUDGMENT
UNDER RCr 11.42 SINCE THE EVIDENCE CLEARLY
ESTABLISHED THAT APPELLANT WAS DENIED
EFFECTIVE ASSISTANCE OF COUNSEL AND DUE
PROCESS OF LAW BY THE FAILURE OF HIS
TRIAL ATTORNEY TO FILE THE TRANSCRIPT
OF RECORD AT THIS COURT WITHIN THE
REQUISITE TIME PERIOD WHICH RESULTED
IN THE DISMISSAL OF HIS APPEAL?

STATEMENT OF THE CASE

Appellant was convicted of storehouse breaking, pos-
session of narcotics, and being an habitual criminal in the
Jefferson Circuit Court and sentenced to life imprisonment on
November 3, 1967 (Transcript of Record, hereinafter designated
T.R., pp. 3-4). Notice of Appeal was filed on November 10, 1967
(Transcript of Record of Prior Appeal, hereinafter designated

TRPA, pp. 16-17). Pursuant to RCr 12.58, an extension of time to 120 days to file a transcript of record was sustained by the trial court on December 15, 1967 (TRPA, pp. 19-20). The 120th day fell on Saturday, March 9, 1968. Appellant's trial counsel placed the record in the mail on March 8, 1968. Since the office of the Clerk of the Court of Appeals was not open on Saturday or Sunday, March 9 or 10, the record was received and filed Monday, March 11. A timely motion was made to dismiss the appeal, which was sustained by this Court. See: Wadsworth v. Commonwealth, Ky., 505 S.W.2d 28 (1968).

On December 17, 1971, appellant filed a pro se Motion to Vacate and/or Set Aside Judgment pursuant to RCr 11.42 with the Jefferson Circuit Court. This Motion was denied in an Order entered on July 10, 1972.

Appellant on November 12, 1975, filed the instant Motion Under RCr 11.42 and an attached Memorandum with the Jefferson Circuit Court (T.R., pp. 8-16). On the same day, the court below summarily overruled the Motion (T.R., p. 17). It should be noted that the Response to Motion Under RCr 11.42 was not filed by the Commonwealth until the day after the Jefferson Circuit Court overruled appellant's Motion (T.R., pp. 17-19). Notice of Appeal was filed on November 19, 1975 (T.R., p. 20).

ARGUMENT

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION TO VACATE JUDGMENT UNDER RCr 11.42 SINCE THE EVIDENCE CLEARLY ESTABLISHED THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY THE FAILURE OF HIS TRIAL ATTORNEY TO FILE THE TRANSCRIPT OF RECORD AT THIS COURT WITHIN THE REQUISITE TIME PERIOD WHICH RESULTED IN THE DISMISSAL OF HIS APPEAL.

It is an accepted principle of law that an indigent defendant has a constitutional right under the Fourteenth Amendment to a review of his case on appeal as a matter of right if that same right is extended to nonindigents. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963); Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959); Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); Eskridge v. Washington Prison Board, 357 U.S. 214, 79 S.Ct. 1061, 2 L.Ed.2d 1269 (1958); see also United States ex rel. Diblin v. Follette, 418 F.2d 408 (2d Cir. 1969). Equally well established is the principle that an indigent is entitled to have counsel to assist him in his appeal. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963); Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); see also Schwander v. United States, 386 F.2d 20 (5th Cir. 1967); Benoit v. Wingo, 423 F.2d 880 (6th Cir. 1970).

If a convicted defendant requests his trial counsel to appeal his case and if that counsel assures the defendant that the appeal will be taken but fails to perfect same, it has been held that a defendant is entitled to a belated appeal because of

ineffective assistance of counsel¹ at a critical stage of a criminal proceeding. Rosinski v. United States, 459 F.2d 59 (6th Cir. 1972); Kent v. United States, 423 F.2d 1050 (5th Cir. 1970); Atilus v. United States, 406 F.2d 694 (5th Cir. 1970).

In the case at bar appellant advised his counsel of his desire to appeal his conviction as evidenced by the fact that his counsel filed a notice of appeal. Appellant's counsel made a fatal procedural error after the notice of appeal was filed by failing to file the transcript of record with the Court of Appeals within the allotted 120 day period. Appellant was certainly denied effective assistance of counsel at the critical appeal stage.

In a factual context comparable to the case at bar, the Seventh Circuit Court of Appeals analyzed a defendant's contention that he had lost his right to a direct appeal because of his court-appointed counsel's procedural error. Macon v. Lash, 458 F.2d 942 (7th Cir. 1972). After collaterally attacking his conviction in the Indiana courts without success, the accused filed a petition for habeas corpus in federal court asserting that his right to appeal from his murder conviction was lost because of the "incompetence and fatal negligence" of his court-appointed counsel. The Court of Appeals for the Seventh Circuit reviewed the accused' allegation of error and concluded:

The Federal Constitution contains
no requirement that a defendant be

¹The Sixth Circuit Court of Appeals has rejected the "farce and mockery" standard as a meaningful test of the right to the effective assistance of counsel. The court, in adopting a more workable and less onerous standard, held that counsel's performance will not be found ineffective if counsel is "reasonably likely to render and rendering reasonably effective assistance." Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

given appellate review of his conviction, but if such review is provided, appellate procedures and their availability to the indigent must satisfy the Fourteenth Amendment's basic standards of fairness. Since the Supreme Court has held that those standards require the states to waive even nominal filing fees, to provide free transcripts, to appoint counsel, and to refuse to dismiss meritless appeals that have not been adequately evaluated by appellate counsel, we believe it is equally clear that petitioner's right to appeal could not be forfeited by the critical error of court-appointed counsel disclosed by this record (emphasis supplied). Id., at pp. 949-950.

The Court of Appeals in Macon v. Lash, supra, added that "it falls short of the requirements of due process for Indiana to foreclose indigents from appealing in a case such as this because of a critical mistake of court-appointed counsel by whom the indigent was represented at his trial." Id., at p. 950.

Appointed counsel in the case sub judice failed to file the transcript of record on time, and, as a result, appellant's right to appeal was denied. It must be remembered that a chain of decisions commencing with Douglas v. California, supra, has made it quite clear that the constitutional right to counsel on appeal is not necessarily met simply by the appointment of counsel to represent an indigent defendant on appeal. In fact, the decision in Anders v. California, supra, raised to constitutional proportions certain minimum requirements imposed on a court-appointed counsel representing his client on appeal. See Baggett v. Wainwright, Fla., 229 So.2d 239, 242 (1970). In view of these precedents, it can hardly be contended that the negligence of a court-appointed counsel should be allowed to deprive an indigent defendant of his constitutional right to appeal. Such a decision

would be in direct contravention to the teachings of the U. S. Supreme Court on this point.

In a factual situation remarkably similar to that in the case at bar, the Supreme Court of Georgia said in McAuliffe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974):

An attorney who through negligence, ignorance, or misinterpretation of the law as contended here, fails to perform routine duties resulting in a dismissal of his client's appeal, thereby denying such client a right of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all. Whether counsel was retained, as here, or appointed by the court, is immaterial. Id., at p. 142.

In Boyd v. Cowan, 494 F.2d 338 (6th Cir. 1974), the Court of Appeals for the Sixth Circuit stated:

It is clear, however, that in this circuit there can be a finding of constitutional denial of a right to appeal by failure of retained counsel to perfect an appeal when the facts in the case impose a duty on him to do so. Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971); Goodwin v. Cardwell, 432 F.2d 521 (6th Cir. 1970). Id., at 339.

The facts in the case at bar, where appellant definitely requested that his counsel appeal his conviction, clearly imposed a duty on appellant's counsel to perfect such an appeal. Unquestionably, appellant's trial counsel failed in this duty when he did not file the transcript of record on time and thus did not perfect the appeal.

Parenthetically, it should be noted that if this series of events had occurred after July 1, 1969, that appellant's transcript of record would have been timely filed with this Court. RCr 1.10 provides that "[t]he provisions of the Rules of Civil Procedures as to time shall apply to the procedures in" criminal cases. Effective July 1, 1969, the so-called "weekend rule",

CR 6.01, would have applied to appellant's situation. CR 6.01 states in part:

In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday (emphasis supplied).

Consequently, if the present Rules had been in effect in March of 1968, appellant's appeal would have been timely filed.

As delineated above, an indigent defendant is entitled to a direct appeal of his conviction with the aid of counsel and, if this right is denied him, such an appellate review must be provided or the conviction will be set aside. Such a result is required even in the absence of an allegation by the defendant that meritorious grounds existed for the appeal. Rodriguez v. United States, 395 U.S. 327, 98 S.Ct. 1715, 23 L.Ed.2d 340 (1969); see also Hammershoy v. Commonwealth, Ky., 398 S.W.2d 883 (1966); Stinnett v. Commonwealth, 446 S.W.2d 293 (1969); Lovelace v. Haskins, 447 F.2d 1254 (6th Cir. 1973).

In the case at bar the record clearly establishes that appellant requested that his counsel appeal his case and that the appeal was dismissed because of the procedural error of counsel. Appellant submits that, in accordance with the constitutional decisions delineated above, he was denied effective assistance of counsel and due process of law when his appeal was dismissed because of his counsel's procedural error.


On this basis appellant contends that this Court should direct the Jefferson Circuit Court to provide appellant with a review of his conviction and that court should appoint counsel to assist appellant in this appeal. This Court should further order that the circuit court must afford such an appeal within a reasonable time or else vacate appellant's conviction and sentence. See Hammershoy v. Commonwealth and Benoit v. Wingo, both supra.

CONCLUSION

For the reasons delineated above, appellant respectfully requests this Court to reverse the order of the circuit court overruling appellant's motion to vacate and order that appellant be granted a belated appeal from his 1967 conviction in the Jefferson Circuit Court.

Respectfully submitted,

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